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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1449.

KENTUCKY STATE BOARD FOR ELEMENTARY AND SECONDARY EDUCATION, et al.,

Petitioners,

v.

REVEREND C. HARRY RUDASILL, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky.

RESPONDENTS' BRIEF IN OPPOSITION.

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REVEREND C. HARRY RUDASILL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY.

RESPONDENTS' BRIEF IN OPPOSITION.

The respondents, Reverend C. Harry Rudasill, *et al.*, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the judgment and opinion of the Supreme Court of Kentucky herein.

QUESTION PRESENTED.

The Supreme Court of Kentucky has held invalid, as applied, certain Kentucky statutes and regulations solely because they violate Section 5 of the Constitution of Kentucky. Petitioners for a writ of certiorari having presented no question under 28 U. S. C. § 1257(3), is the decision of the Supreme Court of Kentucky reviewable by the Supreme Court of the United States?

STATEMENT OF THE CASE.

On September 17, 1977, the respondent pastors, parents, churches and Kentucky Association of Christian Schools, Inc., filed a verified complaint in Franklin County Circuit Court, Kentucky, seeking declaratory and injunctive relief against petitioner State agencies and officials who had threatened respondent parents with immediate criminal prosecution because their children were enrolled in non-"approved or accredited" Christian schools. The complaint alleged that the application of certain State statutes and regulations to respondents' schools and the enforcement thereof by the State violated, *inter alia*, Section 5 of the Constitution of Kentucky. (Complaint, Count IX, Para. 61). The Franklin County Circuit Court, following an evidentiary hearing, granted a temporary injunction. On October 4, 1978, after a four day trial on the merits, that court permanently enjoined the State from proceeding further against respondents on grounds of violation of Section 5 of the Constitution of Kentucky and of the First Amendment to the Constitution of the United States. (See Petition, 30a). The State appealed to the Supreme Court of Kentucky which, on October 9, 1979, affirmed * the judgment of the trial court insofar as that judgment declared that the application to respondent schools of the aforesaid statutes and regulations, and the enforcement thereof by the State, violated Section 5 of the Constitution of Kentucky.

* The mandate recites that "the judgment is affirmed in part and reversed in part" (see Supplemental Appendix to Petition, 1), the meaning apparently being that the court desired to make it explicit that its decision rested solely on the non-federal ground.

REASONS WHY THE WRIT SHOULD BE DENIED.

The Supreme Court has consistently held that it will not review a state court judgment which is based upon an adequate and independent state ground. *Murdock v. Mayor of Memphis*, 87 U. S. (20 Wall.) 590, 636 (1875); *Herb v. Pitcairn*, 324 U. S. 117, 125 (1945). The parallel established principle is that, for Supreme Court certiorari jurisdiction to exist, it must be shown that a federal question under 28 U. S. C. § 1257(3) is presented.

1. There can be no doubt that the judgment below is based upon a state ground which is "independent"—namely, Section 5 of the Constitution of Kentucky. As noted, the Supreme Court of Kentucky went so far as to expressly exclude resting its decision upon any federal ground. The State does not deny that the state ground chosen by the court is an "independent" ground; the State's point is instead that that ground is not a "fair and substantial adequate state ground" (Petition 9) because it constitutes "the purposeful and deliberate avoidance in considering this case under the First and Fourteenth Amendments." *Ibid.* The State goes on to say that "all of the parties relied on the federal First Amendment issues . . ." *Ibid.* It caps this point about the court's alleged "avoidance" of federal constitutional issues by saying that that point is the State's whole case:

> ". . . the purposeful and deliberate avoidance . . . is at once the basis of the Commonwealth's request to this Court for review and also the heart of the flaw requiring this Court if the writ is granted, to reverse the decision of the Supreme Court of Kentucky as being unwarranted under the federal constitution." (*Ibid.*)

If so, the Petition must of course be denied.

The State had raised no issues under the First or Fourteenth Amendments at any stage below. It was the *respondents* who had. In no sense did the State "rely" on First Amendment issues. Those issues had been raised by *respondents* (Petition 6), and the State, in its answer, and at all stages thereafter denied that those First Amendment claims were valid issues. As to the Fourteenth Amendment, the State raised no question thereunder at any stage below. Only now, at the level of this Court, and too late (28 U. S. C. § 1257; *Cardinale v. State of Louisiana,* 394 U. S. 437, 439 (1969)) does the State make a passing and indistinct allusion to one Fourteenth Amendment provision—that relating to equal protection. Petition, 17.

In an effort to lend substance to its claim that the Kentucky Supreme Court was guilty of "avoidance", the State decries that court's chosen ground for decision as a "false" state issue and cites to *Ward v. Love County,* 253 U. S. 17 (1926) and *Lawrence v. State Tax Commission,* 286 U. S. 276 (1932). These cases are not in point. Each involved a patently untenable state ground, or "a mere device to prevent review of the decision upon the federal question." *Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.,* 243 U. S. 157, 164 (1917). In *Ward,* for example, (a) the state supreme court was charged with knowledge that the Supreme Court of the United States had already determined that a federal claim existed and had passed upon it, (b) the petitioners for certiorari therein had, from the outset, raised issues under the laws and Constitution of the United States. The State in the present case, it must be repeated, never raised any federal issue at any stage of the proceedings below.

The ground of the judgment below is clearly an adequate ground. The opinion of the Kentucky Supreme Court constitutes an exhaustive history, analysis and interpretation of Section 5 of the Constitution of Kentucky upon which the court based its decision, and it carefully delineates why and how that provision is applicable to the facts of this case. The State would have the Supreme Court of the United States now preempt a state supreme court's role, entangle itself in state judicial processes, and enter upon a revision of the Kentucky Supreme Court's judgment as seen in light of prior judgments by that court. In lengthy argument, from Page 10 to Page 17 of the Petition, concerning the meaning of Section 5, the State avers that the ruling below "is totally inconsistent with the past unambiguous constructions of Section 5 of the Kentucky Constitution . . .", here citing other Kentucky Supreme Court decisions which the State believes to be inconsistent with the decisions below. Petition, 11. But it has long been "the established doctrine of this [United States Supreme] court that it will adopt and follow the decisions of the state courts in the construction of their own Constitution and statutes, when that construction has been settled by the decision of its [*sic*] highest judicial tribunal." *Nesmith v. Sheldon,* 48 U. S. (7 How.) 812, 818 (1849), *Accord, Hortonville Joint School Dist. v. Hortonville Education Asso.,* 426 U. S. 482, 488 (1976). That principle obtains unless the construction appears to be an "obvious subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc. v. Johnson,* 326 U. S. 120, 129 (1945). Petitioners are able to demonstrate no subterfuge upon the part of the Kentucky Supreme Court.

That that court chose to determine the case upon the basis of a state constitutional provision which is more restrictive of state power than a particular federal constitutional provision may be does not spell subterfuge or arbitrariness upon the part of that court. The fact that some state courts construe state constitutional counterparts

of provisions of the Bill of Rights as "guaranteeing citizens of their states even more protection than the federal provisions" has been described as "an important and highly significant development for our constitutional jurisprudence and for our concept of federalism." See W. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 495 (1977).

2. This Court has said: "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb, supra,* at 125-126. No federal question described in 28 U. S. C. § 1257(3) is here presented. This is seen, first of all, at Page 2 of the Petition, where the "Question Presented", as seen by the State, is stated. This makes no reference to any federal question. Thereafter, on the same page and continuing onto Page 5, the Religion Clauses of the First Amendment, the text of the Tenth Amendment, and Section One of the Fourteenth Amendment are set forth as the federal "Constitutional Provisions Involved", but nowhere subsequently does the Petition make clear how they are involved. As to the First Amendment, the Court is respectfully referred to respondents' discussion *supra.* As to the Tenth Amendment, the State's apparent claim is that the Kentucky Supreme Court has destroyed Kentucky's power "to develop a system of educating children residing [in Kentucky]." Petition, 14. But two comments need be made: (a) the State, before the trial court and as an appellant before the Kentucky Supreme Court, had never raised any Tenth Amendment question, (b) the Tenth Amendment represents a protection of states from encroachment by the *federal* government, *United States v. Darby,* 312 U. S. 100, 123-124 (1941), not from adjudications by the state court system.

The State's attempt to raise, for the first time, at the Supreme Court level, an issue of equal protection must likewise fail. As the State itself says, "no child was a complaining party at the inception of this lawsuit." Petition, 18. The State at no point has presented itself as representing any child or group of children who allege inequality of treatment under Kentucky laws. A litigant is not ordinarily permitted to assert the rights of absent third parties. *Flast v. Cohen,* 392 U. S. 83, 99, n. 20 (1968). Nor does the State in any way describe the nature of the claimed denial of equal protection.

CONCLUSION.

For all of the foregoing reasons, it is respectfully requested that the writ of certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE.

I, William B. Ball, counsel for the respondents, hereby certify that three (3) copies of the foregoing Respondents' Brief in Opposition were mailed, postage prepaid, to Honorable Steven L. Beshear, Attorney General, Capitol Building, Frankfort, KY 40601, Bert T. Combs, Esq., 2600 Citizens Plaza, Louisville, KY 40202, Edward L. Fossett, Esq., Kentucky Department of Education, Capitol Plaza Tower, Frankfort, KY 40601, Arthur L. Brooks, Esq., Jennifer B. Coffman, Esq., 180 North Mill Street, Lexington, KY 40507, John J. Slattery, Jr., Esq., 101 West Walnut Street, Louisville, KY 40202.

William B. Ball

April 21, 1980.